

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of:)	
)	
Implementation of Section 6002(b) of the)	WT Docket No. 11-186
Omnibus Budget Reconciliation Act of 1993)	
)	
Annual Report and Analysis of Competitive)	
Market Conditions With Respect to Mobile)	
Wireless, including Commercial Mobile Services)	

COMMENTS OF FREE PRESS

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SUMMARY

For years, the market for mobile wireless services in the United States has become increasingly broken. Two vertically integrated, national, dominant carriers hold immense power and generate significant profits, while every other competitor struggles to grow or even to survive. This disparity has not improved in the past year, but in fact has gotten worse. The result is a market that proves unfriendly to consumers, to competition, and to innovation.

Recent months have witnessed an increasing number of restrictive blocking and pricing practices for mobile Internet access services. These changes are signs of a lack of meaningful competition among wireless carriers, as well as a lack of adequate consumer protections in Commission rules. Meanwhile, consumers are beginning to shift ever more of their mobile data traffic off of the mobile wireless network infrastructure altogether and onto alternatives, particularly Wi-Fi.

These developments suggest that unlicensed access is the most flexible, efficient, and powerful use of public spectrum resources, with the greatest social and economic potential for the future of wireless – which in turn should encourage the Commission to continue to push aggressively for new allocations of unlicensed spectrum, while adopting additional policies to address the lack of robust competition among mobile wireless service providers.

Free Press urges the Commission to recognize the new and anti-consumer practices in the wireless industry, as well as the challenges and opportunities to increase meaningful competition on service quality and price, and the opportunity for additional unlicensed spectrum to help serve as a functional substitute in the near and the distant future of wireless networks and connectivity.

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I. Introduction

The Commission's annual reports on mobile wireless competition serve a valuable purpose for the agency, for other federal and state government officials, and for the public. These reports chronicle an increasingly broken market for mobile wireless services, demonstrating the power and profit of two vertically integrated, national, dominant carriers – and the struggles of every other competitor to survive and grow. As the comments filed by many parties in this proceeding are sure to indicate, the market failures in the mobile wireless industry have continued to worsen, and carriers generally show few signs of being able to compete on a level playing field to offer better or cheaper service, particularly in the growing market for mobile Internet access services. The result for consumers is an increasing variety of restrictions on services, as well as pricing practices that will discourage use and innovation in the broader Internet ecosystem.

The past two reports on wireless competition released by the Commission have taken a comprehensive analytical approach, examining a broad range of factors that illustrate the market's structure and performance. These analyses have included examination of a range of upstream and downstream elements that both impact, and are impacted by, the market for wireless connectivity and communications services.¹ Free Press encourages the Commission to continue this approach, and to take into account the broad range of factors that impede effective and meaningful competition in the wireless industry, including ongoing practices catalogued by

¹ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, including Commercial Mobile Services, WT Docket No. 11-186, *Public Notice*, DA 11-1856 (rel. Nov. 3, 2011) (“*Public Notice*”), at 2 (describing the information sought as “information and insights on competition across the mobile wireless ecosystem” structured in a framework of industry structure, firm conduct, market performance, and consumer behavior, including input and downstream segments, intermodal competition, urban-rural comparisons, and international comparisons).

Free Press in past competition proceedings as well as new developments which have arisen in recent months.

In this *Public Notice*, the Commission seeks input from the industry and the public on changes that have arisen in the past two calendar years.² Most notable among such new developments, recent months have witnessed an uptick in restrictive blocking and pricing practices for mobile Internet access services. These changes are signs of a lack of *meaningful* competition among wireless carriers – where effective competition may be best understood as competition that improves service quality or reduces price for Internet access services – as well as a lack of adequate consumer protections in Commission rules. In parallel to these developments, and likely in part as a response to them, consumers are beginning to shift ever more of their mobile data traffic off of the mobile wireless network infrastructure altogether and onto alternatives, particularly Wi-Fi. These developments suggest that unlicensed access is the most flexible, efficient, and powerful use of public spectrum resources, with the greatest social and economic potential for the future of wireless – which in turn should encourage the Commission to continue to push aggressively for new allocations of unlicensed spectrum while adopting additional policies to address the lack of robust competition among mobile wireless service providers.

II. Firm Conduct: Increased Blocking and Restrictive Business Models

One segment of the Commission’s analysis consists of examining firm conduct, behavior by wireless carriers or other businesses that demonstrate the level of competition or illustrate an effect on competition. One category of these practices, the use of exclusive deals for handsets and other wireless devices, has been thoroughly discussed in past proceedings on wireless

² *Id.* (requesting “data and statistics for the calendar-year 2010 time period, as well as information on any trends and developments that have occurred during 2010 or 2011.”).

competition,³ but deserves further scrutiny in this proceeding. Additionally, the *Public Notice* seeks comment on whether “service providers, operating system developers, and equipment manufacturers [have] changed the way consumers can access applications and use features on their devices.”⁴ Free Press has already brought to the Commission’s attention two such changes that have taken place in recent months: blocking tethering applications and blocking users’ access to certain categories of Internet content.

Blocking Tethering Applications

Multiple wireless carriers have recently begun impeding the use of third party tethering applications on their networks. At present, these actions are being taken indirectly, through pressure on the operators of “app stores” for smartphones to de-list tethering applications and make them difficult or impossible for consumers to install.⁵ Free Press has highlighted the actions of Verizon Wireless in particular, by filing a complaint with the Commission alleging that such restrictions constitute a violation of the company’s legal obligations for the use of its C block spectrum licenses.⁶ However, Verizon Wireless is not the only carrier abusing its terms of service and restricting usage in this fashion. Numerous reports indicate that AT&T, T-Mobile, and Sprint are engaging in the same practice,⁷ meaning that consumers have no option of a

³ See, e.g., Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 15-18 (filed June 15, 2009) (“2009 PN Comments”).

⁴ *Public Notice* at 14.

⁵ See, e.g., Brian X. Chen, “Another Tethering App Bites the Dust,” *New York Times* (Nov. 29, 2011), at <http://gadgetwise.blogs.nytimes.com/2011/11/29/another-tethering-app-bites-the-dust/>.

⁶ Complaint of Free Press Against Celco Partnership d/b/a Verizon Wireless for Violating Conditions Imposed on C Block of Upper 700 MHz Spectrum (June 6, 2011), available at http://www.freepress.net/files/FreePress_CBlock_Complaint.pdf.

⁷ E.g. Cameron Summerson, “The Carrier Crackdown Continues: Sprint Now Blocking Tethering Apps in the Android Market,” *Android Police* (Oct. 28, 2011), at <http://www.androidpolice.com/2011/10/28/the-carrier-crackdown-continues-sprint-now-blocking-tethering-apps-in-the-android-market/>.

national wireless carrier that permits the use of third party tethering applications.

Although these carriers may argue over legal obligations under license conditions or the Commission's limited rules regarding openness of mobile Internet access services, such questions need not and should not be resolved in this proceeding. For purposes of industry analysis and this report, however, Free Press urges the Commission to take note of the substantial restrictions imposed on installation and use of third-party tethering applications by the four national carriers, which collectively represent over 90% of the market. These third-party applications could and should compete with the carriers' proprietary applications that perform similar functions. Such competition should be working to drive down the price and increase the utility of service for end-users, but this benefit has been forestalled as a direct result of conduct by these carriers.

Modern-day Walled Gardens

Even more restrictive than these blocking practices of the four national carriers are steps taken by two smaller, regional carriers that have implemented pricing practices with a significant and direct impact on the use of a broad range of popular Internet applications and services. First MetroPCS, and more recently C Spire, adopted tiered pricing systems that allow unlimited use of some Internet applications and services at all service levels, but that limit or prohibit use of other applications and services for all plans other than their most expensive ones.⁸ Changes to AT&T's terms of service for its wireless plans indicate that larger companies may follow in this path.⁹

These practices appear on their face to be in violation of the Commission's open Internet

⁸ See Letter from M. Chris Riley, Free Press, to Chairman Julius Genachowski, GN Docket No. 09-191, WC Docket No. 07-52, at 1 (Jan. 10, 2011) ("MetroPCS Letter").

⁹ See, e.g., Bob Sullivan, "Why fine print might ground your high-flying 4G cellphone service," *MSNBC.com* (Nov. 15, 2011).

order, as the letter previously filed by Free Press made clear.¹⁰ However, as with tethering, such substantive questions need not be resolved to evaluate the competitive impact of the restrictions on downstream markets. By charging more for some uses of the Internet than for others, these discriminatory pricing practices will discourage the use and adoption of video streaming, and potentially a range of other Internet applications and services.

Wireless carriers will no doubt highlight these very practices in this proceeding, suggesting that they constitute a form of price competition. Free Press contends instead that wireless communications services that do not provide nondiscriminatory access to the entire Internet, including all lawful applications and services that the consumer wishes to use, do not function as substitutes for full Internet access service. Consequently, they do not “compete” with more expensive, unrestricted plans; nor do they represent “reduced” price for Internet access services. Any alternative interpretation would be inconsistent with Commission precedent in its market analysis and data gathering practices, as established in past Form 477 reports and orders.¹¹

Exclusive Deals Continue to Impair Meaningful Competition

As Free Press has argued repeatedly in past filings in wireless competition proceedings, exclusive deals for handsets greatly impair effective competition by allowing providers to reduce investment or inflate service prices without incurring any significant subscriber churn.¹² Although the iPhone has now been made available through multiple carriers, its history must not

¹⁰ See MetroPCS Letter at 3-4.

¹¹ See Letter from M. Chris Riley and Cary Adickman, Free Press, to Chairman Julius Genachowski, WC Docket No. 07-38 (Aug. 9, 2011) (suggesting that language from the Form 477 Order directs reporting for mobile providers of only “the number of subscribers whose device and subscription permit them to access the lawful Internet content of their choice.”); see also *Public Notice* at 8-9 (discussing Form 477 and competition).

¹² See, e.g., 2009 PN Comments at 15-18.

be forgotten. Having an exclusive deal for the iPhone allowed AT&T to underinvest in its network, charge exorbitant service prices, and reap record profits¹³ – resulting in a profitable but poorly operated network, and a company that felt compelled (for this reason and others) to come to the government and ask for a handout in the form of permission to enter into an anticompetitive merger.¹⁴ The impact of ongoing exclusive deals for other devices, including smartphones and tablets, may not be as readily apparent today but will be felt nevertheless.

The *Public Notice* implicitly references these exclusive agreements as a tool used by providers to compete with each other.¹⁵ This statement is true on its face – wireless providers do use exclusive access to devices as a form of competition – but the implication is misleading. Competition over exclusive devices offerings, and the significant amounts of money spent on advertising the devices themselves and not the network or the access service, represent illusory and ineffective competition.¹⁶ It comes at the expense of *meaningful* competition by mobile wireless service providers, namely, competition over the price for or quality of their access services.¹⁷

Congress directed the Commission to include in its reports “an analysis of whether or not there is effective competition.”¹⁸ Pursuant to this mandate, Free Press urges the Commission to distinguish meaningful and effective competition over price and quality of like services from

¹³ Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 17-25 (filed Oct. 22, 2009) (discussing in detail the history of AT&T’s network and customer practices during the early years of iPhone offerings).

¹⁴ See generally Staff Analysis and Findings, In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65 (rel. Nov. 29, 2011).

¹⁵ See *Public Notice* at 7.

¹⁶ Reply Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 22-23 (filed July 13, 2009).

¹⁷ *Id.*

¹⁸ 47 U.S.C. § 332(c)(1)(C).

illusory and ineffective competition over exclusive device offerings. This distinction is particularly important when the latter occurs in lieu of the former, with significant impact to reduce investment and reduce price competition.

Special Access Services, Interoperability, and Data Roaming Remain Ongoing Concerns

In addition to exclusive agreements for handsets, other practices that harm competition and that have been analyzed in past Commission reports, including those related to special access and backhaul services, interoperability of devices, and data roaming, remain as obstacles to effective competition, despite some intervening regulatory actions.

The Commission's open proceeding on special access services has received many filings over many years.¹⁹ Collectively, the record makes a compelling case that recent deregulation has led prices for special access and backhaul services to skyrocket.²⁰ These services represent a fundamental and mandatory input to the offering of a wireless Internet access service. Furthermore, the high rates for special access are often charged by the vertically integrated wireline and wireless carriers Verizon and AT&T, who have a natural incentive to raise their competitors' costs.²¹ The impact of the broken market for special access services on wireless competition should be analyzed in the Commission's report.

Similarly, the issue of device interoperability, as previously discussed by Free Press and others in multiple Commission proceedings,²² is of significant importance. Devices represent a

¹⁹ A search in the relevant docket, WC Docket No. 05-25, returns well over 800 results. Additional filings have also been made in the Commission's National Broadband Plan proceedings, and in other dockets.

²⁰ See, e.g., Comments of Free Press, In the Matter of A National Broadband Plan for Our Future, GN Docket No. 09-51, at 119-27 (filed June 8, 2009).

²¹ See, e.g., Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, WT Docket No. 09-66, at 27-28 (filed Sept. 30, 2009).

²² See, e.g., Notice of *Ex Parte* Presentation of Free Press, RM No. 11592; WT Docket Nos. 11-

separate essential input into the offering of a wireless service, whether voice or data or both. The “vanity band class” division of 700 MHz spectrum creates an artificial technological divide that greatly raises the costs to smaller competitors of acquiring and offering handsets to users. The impact of these costs on the viability and profitability of smaller carriers should be evaluated in the report.

Finally, although the Commission has adopted an order to require reasonable data roaming,²³ the issue remains one of concern, as it has been in past years.²⁴ It is too soon to determine whether the Commission’s order will be adequately enforced – if it can be enforced at all. Consequently, struggles by smaller carriers to enter into data roaming agreements with larger carriers should be taken into account by the Commission.

III. Market Performance: High Usage-Based Pricing Contrary to Demand

A significant portion of the discussion of wireless competition in this proceeding will center on the shift towards usage-based pricing for data.²⁵ This change will undoubtedly be held up by the wireless industry as evidence of price competition, or even of falling prices, based on the usage of today’s typical wireless user. Yet industry arguments show a marked contrast between spectrum policy, where rising average use is foremost among talking points; and competition policy, where today’s median or even average use is considered the most significant data point, and is used to support short-lived assertions that the cost of services to consumers is going down. Usage-based pricing can produce bills for consumers in the thousands of dollars, a

18, 11-65; WC Docket No. 05-25 (filed June 29, 2011); Reply Comments of the Public Interest Spectrum Coalition, RM No. 11592 (filed Apr. 30, 2010).

²³ In the Matter of Reexamination of Roaming Obligations of Commercial Radio Service Providers and Other Providers of Mobile Radio Services, *Second Report and Order*, FCC 11-52 (rel. Apr. 7, 2011).

²⁴ See, e.g., 2009 PN Comments at 30.

²⁵ See *Public Notice* at 5 (seeking information “on innovations or developments that have occurred with mobile wireless pricing plans during 2010 and 2011.”).

concern that led in large part to the recent proceeding on “bill shock.”²⁶ The Commission’s failure to adopt binding rules to protect consumers from bill shock will not alleviate this problem, and the industry’s history of poor compliance with “voluntary guidelines” has been well documented in past Commission proceedings.²⁷

Free Press urges the Commission to avoid comparing apples to oranges, and therefore not accept the claim that comparing the average price of an unlimited use plan with the average price of a limited use plan for today’s data users shows that prices have fallen. Any such assertions would prove temporary and misleading, at best. If the marginal price of use falls at a greater rate than the volume of average use increases, resulting in a reduced average monthly price for consumers when comparing only usage-based plans, then a conclusion that prices are falling can be reached. But this year’s annual report will come too soon to make determinations of this sort.

The adoption by a few carriers of usage-based pricing plans does not inherently demonstrate a competitive or uncompetitive market. Currently, the four national wireless carriers take a range of approaches towards pricing, with two carriers adopting a cap and fee approach for phones and tablets; one carrier using speed throttling after a cap is exceeded; and the fourth using caps and fees for tablets and hot spots, but offering true unlimited use on smartphones. However, should the four national carriers’ practices shift towards uniform usage-based pricing with no clear connection between marginal or average cost and the retail price for usage – as with text messaging, where the history of parallel pricing has been well demonstrated²⁸ – then this evolution should be considered clear evidence of a market failure, especially when consumers have demonstrated a clear preference for unlimited use plans.

²⁶ See *id.* at 6 (describing the “bill shock” proceeding and seeking updated information).

²⁷ See, e.g., Comments of Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, and Public Knowledge, CG Docket No. 09-158, at 17-20 (filed Oct. 13, 2009).

²⁸ 2009 PN Comments at 10-12.

Finally, the Commission must avoid comparing the prices of restricted, walled-garden data services to mobile wireless services that provide access to all of the lawful Internet content, applications, and services of the user's choosing. These two categories of services are not substitutes for each other, as discussed above. Evaluating the average price within a category of "data services" that includes services both limited and unlimited with respect to the types of content they can access would be a fallacy.

IV. Consumer Behavior: Increased Use of Wi-Fi and Unlicensed Spectrum

The Commission seeks comment in part on the integration of mobile wireless technologies with Wi-Fi.²⁹ Where the form of Wi-Fi in use is a tethering application, this formulation is correct. However, in a greater number of instances, the proper integration to examine is between fixed network technologies and mobile devices using Wi-Fi. As mobile carriers continue to impose more restrictions on usage and adopt usage-based pricing plans for mobile broadband services, consumers have increasingly begun using their "mobile" devices over Wi-Fi and other unlicensed spectrum connections to fixed networks. Accommodating this trend and the increased inclusion of Wi-Fi in mobile devices, cellular carriers have deployed thousands of Wi-Fi hot spots in urban areas to reduce congestion in their networks – a radical shift for AT&T in particular, as the company worked for years to delay the inclusion of Wi-Fi radio capability in mobile devices.³⁰

The *Public Notice* seeks specific comment on consumer use of tablet devices,³¹ for which the trend of increased dependence on Wi-Fi is particularly prominent. According to some

²⁹ *Public Notice* at 6.

³⁰ See 2009 PN Comments at 17.

³¹ *Public Notice* at 7.

sources, 90 percent of page views over Apple iPads are delivered over Wi-Fi connections.³² The *Public Notice* asks whether increasing use of tablet devices has an impact on competition among providers.³³ Any impact of these devices on competition is significantly diluted when such a large portion of the traffic does not, in fact, travel through cell towers or over any part of the mobile wireless network infrastructure.

The Commission should take note of this development in its report on competition in the wireless industry, and should recognize in the report the importance of unlicensed spectrum in both the short and long term. Separately, the Commission should continue its efforts to make more spectrum available for use on an unlicensed basis, particularly in urban areas where the TV White Spaces are not as open and where Wi-Fi is already in very heavy use.

V. Conclusion

Changes in industry and consumer practices over the last year demonstrate an ongoing lack of effective competition in the mobile wireless industry. Free Press urges the Commission in its next report to recognize these developments, as well as the challenges and opportunities to increase meaningful competition on service quality and price, and the opportunity for additional unlicensed spectrum to help serve as a functional substitute in the near and the distant future of wireless networks and connectivity.

³² E.g. Yochai Benkler, “Selling Our Wireless Future,” *AVC* (Nov. 5, 2011), at http://www.avc.com/a_vc/2011/11/selling-our-wireless-future.html.

³³ *Public Notice* at 7.

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